United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-1443

To be argued by
ROBERT E. GOLDMAN

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IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

against

ELYAKIM G. ROSENBLATT,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York, convicting appellant, after a trial before the Hon. Constance Baker Motley and a jury, of conspiracy to defraud the United States, in violation of Title 18, United States Code, Section 371, and sentencing him, on September 24, 1976, to six months

imprisonment and a fine of $8,000. Execution of sentence has been stayed pending resolution of this appeal.

ISSUES PRESENTED

I. Was the evidence sufficient as a matter of law?

(A) Did the government prove an agreement sufficient to underly a conspiracy to defraud the United States?

(B) Did the government prove that an overt act in furtherance of the conspiracy alleged was committed in the Southern District of New York?

(C) Did the government prove that the agreement Rosenblatt believed he entered into was one to defraud the United States?

II. Did the court's charge contain reversible error?

STATEMENT OF THE CASE

Pre-Trial Proceedings

On February 10, 1976, an indictment was handed up by a grand jury impanelled in the Southern District of New York, charging Elyakim G. Rosenblatt, a rabbi in Briarwood, Queens, and Morris D. Brooks, with conspiracy to defraud the United States, under 18 U.S.C. §371, and additionally charging Brooks

only with eight substantive counts of making false entries, under 18 U.S.C. §2073. An omnibus pre-trial motion was filed on behalf of Rosenblatt on April 26, 1976, and included motions to dismiss the indictment based on its failure to allege an agreement sufficient to support a conspiracy to defraud, and its failure to allege facts supporting venue in the Southern District. Those facets of the omnibus motion were denied. Prior to the trial of the case, Brooks pleaded guilty on this indictment (76 Cr. 142) to the conspiracy count and one substantive count of making false entries (A37),* and also pleaded guilty on another indictment (76 Cr. 143), which charged him with stealing $230,000 in checks from the Post Office (A37) in a separate incident.

Evidence at Trial

The government's proof consisted principally of the testimony of the lone alleged co-conspirator, Morris D. Brooks, who, from the inception of the conspiracy charged until about August 22, 1975, was employed in the accounts payable section of the Postal Data Center in Manhattan (A38-A39, A83).

It was stipulated that between July, 1974 and

*All references in parentheses are to page numbers in appellant's appendix.

August, 1975, Brooks embezzled and stole eight government checks, totalling $184,505.30. He obtained them by making false entries on certain Postal Service forms, which resulted in the checks being printed and made payable to parties having no claim against the Postal Service for such payment. Brooks then either physically removed the checks from the Postal Service or had them sent to his home (A35-A36).

It was further stipulated that Rosenblatt did not know of Brooks' activities in falsifying the entries or stealing the eight checks (A36, A313).

Brooks testified that after obtaining the first two checks in question, in July, 1974, he took them to a friend of his, David Hardoon, for cashing, telling Hardoon they represented loans from some woman (A39, A41). When that effort proved unsuccessful, Brooks called Rabbi Rosenblatt, with whom he had attended school many years before, and asked him if he would cash two government checks (A42) which he said were good (A119). Rosenblatt said he wouldn't cash checks just like that, that he would have to ask his accountant if it was okay, and wanted some kind of service for it (A42). A few days later Brooks had Hardoon drive him to Rosenblatt's school or office in Briarwood, Queens, where Brooks showed him the checks, explaining that they were from a person who did not want them

put through his account because he did not want to pay taxes, or wanted to save money on taxes (A43-A44, A121, A122, A123).

After discussing what Rosenblatt's commission would be for cashing the checks and agreeing to something less than 10%, Brooks left. After obtaining the cash a few days later, Rosenblatt, following Brooks' instruction, gave it to Hardoon for delivery to Brooks (A44-A45).

In late October, 1974, Brooks obtained another check, and again asked Rosenblatt to cash it (A46). This time, however, when asked about the source of the check, Brooks said that the payee "had like a contract with the Government and he's getting like a kickback or something. So he doesn't want to put it through his account" (A46-A47). A few days later, Rosenblatt gave Brooks the face value of the check less ten percent.

The same basic procedure was followed for the subsequent checks, Brooks telling Rosenblatt the story about taxes, and on one other occasion, kickbacks (A80). Starting with the third transaction, Brooks would go with Rosenblatt to the latter's bank in Kew Gardens, Queens, to withdraw the money, because of the amount involved (A50). On various occasions Brooks would be given the money for the checks at

the bank, and then give Rosenblatt his commission, which was ten percent. Brooks always endorsed the payee's name before bringing a check to Rosenblatt (A40, A46, A48, A54, A58 A65, A79), and except for the two involved in the initial transaction, the checks were all deposited in the account of the Rabbinical College of Queens (A44, A46, A48, A54, A58, A65, A79).

The payee named on four of the checks was one H. L. Dalis, who Rosenblatt referred to as Dali. On occasion Rosenblatt would inquire as to whether there were more checks from Dali (A35, A79).

Brooks never told Rosenblatt how payees were going to save on taxes (A121), conceal kickbacks (A126-A127), or in any other way hide the receipt of money (A121-A122).

Brooks personally received approximately $165,000 from the checks that were cashed, all of which he lost gambling (A144-A145).

David Hardoon testified that during the period of the alleged conspiracy he knew Brooks fairly well, living directly across the street from him (A168-A169). In July, 1974, Brooks came to him with one check to cash, but he did not cash it for him (A169-A170). The next day he drove Brooks

to Rosenblatt's house where he heard Brooks ask Rosenblatt to cash a check, and Rosenblatt's reply that he would have to check with his accountant (A172). He did not hear any mention of taxes or ten percent commissions (A183). From time to time during the following months Hardoon carried envelopes back and forth between the two men, but was not sure what they contained (A172-A173). He was uncertain of what the transactions involved, because "Morris Brooks tells you so many stories. I didn't know what to believe and what not to believe" (A191). Sometime in late December, 1974, or early January, 1975 (A175, A187-A188), upon speaking to Rosenblatt about his dealings with Brooks and telling him he thought something was wrong, Rosenblatt responded that he should not worry, he knows Dali (A175, A189).

Irving Fischer testified that he was the General Manager and Vice President of H. L. Dalis, Inc., a company that has, on occasion, been a vendor to the Post Office, but has never had any dealings with Rosenblatt (A204-A205). He stated that there was an individual named Harry L. Dalis, and that the firm has received checks and correspondence simply addressed to H. L. Dalis (A205-A206).

Matthew Rankel testified that he was the Assistant Treasurer and Manager of the Kew Gardens branch of the Chase

Manhattan Bank (A207-A208), and identified many of the checks and bank documents referred to and introduced, including a visitation record of Rosenblatt's safe deposit box (A220). He stated that all of the transactions at his bank involving Rosenblatt and Brooks were conducted openly (A224), and reflected perfectly proper banking transactions (A222). Rankel ultimately testified to Rosenblatt's good character (A225).

Finally, Eugene B. Zambarda, a United States Postal Inspector, testified as to certain procedures and forms employed in the Postal Service.

Elyakim G. Rosenblatt testified in his own behalf and stated that he was the Dean of the Rabbinical College of Queens, the Rabbi of Grand Central Synagogue, and the Dean of the Beth Jacob Seminary of Queens (A306).

Rosenblatt knew Brooks from when they were both students twenty-five years ago, but had very little to do with him since (A303). In July, 1974, David Hardoon asked Rosenblatt if he could help Brooks out by cashing a government check for him, which Rosenblatt did (A304, A308). Either at that time, or during the next transaction, Brooks told Rosenblatt that the Post Office ticker that printed the check erred in leaving off "Inc." after the named payee, and that

the people involved did not want to send the checks back to be corrected as that would take some time, and they wanted them cashed right away (A307, A350). Brooks never mentioned taxes, or kickbacks, or that anyone was trying to hide any money from the government, in the course of any of the transactions (A306, A312-A313, A315, A331).

During the first transaction, in which the face value of the checks was $10,000, Brooks insisted that Rosenblatt keep a commission, which turned out to be $300 (A308-A309). Thereafter, when Brooks insisted that a percentage should be kept, Rosenblatt refused to personally benefit, and only agreed to accept the money on behalf of the Rabbinical College of Queens, which was the ultimate beneficiary of the payments (A309, A353-A354). Rosenblatt placed the College's stamp or wrote the College's name on each succeeding check brought to him to be cashed (A322), and after each cleared, returned to Brooks the face value less whatever amount Brooks determined should go to the College (A308, A319, A327, A360-A361, A370, A376). The total deducted from the face value of the checks in this manner was less than $8,000 (A299, A312, A314, A317, A319, A325, A327). In each of the last three transactions Brooks gave Rosenblatt $1,000 in cash, which Rosenblatt deposited in an established charity cash fund that the Rabbinical College had maintained for

many years, and which was kept in his personal safe deposit box (A322, A326, A327, A360, A379-A380, A386). At no time did Rosenblatt ever refer to H. L. Dalis as Dali (A394).

Sixteen character witnesses testified as to Rosenblatt's excellent reputation for honesty, integrity and morality, and as to their personal opinions to the same effect. Many of these witnesses further testified as to Rosenblatt's lack of worldliness and sophistication, and his inability to doubt the motives of those requesting his help (A295-A296, A300-A301, A344, A401, A405).

Post-Testimony Proceedings

At the close of the government's case, and again at the close of the entire case, Rosenblatt's counsel moved for a judgment of acquittal, each of which motion was denied (A237-A274, A419-A425). Among the grounds that were included in those motions (and subsequently included in motions to set aside the verdict and for a new trial) was the failure to prove an agreement sufficient to support the conspiracy charged, the lack of venue, and the failure to substantiate any defrauding of the United States, or conspiracy to do so.

The jury found Rosenblatt guilty of conspiring to

defraud the United States. On September 24, 1976, Judge Motley sentenced him to a six month term of imprisonment and fined him $8,000. Brooks' sentence on his plea of guilty in this case, to essentially the theft of $184,000, resulted in Judge Motley's giving him a suspended sentence and probation. On his plea of guilty in his other case involving the $230,000 check, a suspended sentence, probation and a $2,000 fine were imposed.

ARGUMENT

POINT I

The Evidence Was Insufficient As A Matter Of Law To Sustain The Conviction

Even in the light most favorable to the government, as this Court must consider it, Glasser v. United States, 315 U.S. 60, 80, 86 L.Ed. 2d 680, 704 (1942); United States v. Mariani, (2d Cir. July 19, 1976) slip.op. p. 5045, 5047, and taking into account the presentation by appellant, United States v. Mariani, supra, the evidence in this case was insufficient as a matter of law to sustain the conviction.*

Neither an agreement between Brooks and Rosenblatt sufficient to support the charge, nor any overt act committed in the district of prosecution in furtherance of the alleged conspiracy, was proved. Even if the conspiracy is not measured by the actual limited agreement reached between the two men, but expanded to encompass that which Rosenblatt believed to have been reached, it is insufficient to support a conspiracy to defraud the United States.

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*The motions for a judgment of acquittal at the close of the government's case and the entire case, based upon the grounds included herein, were denied.

A. The evidence was insufficient to support a finding that the necessary agreement underlying a conspiracy to defraud the United States was reached.

Taken in its most favorable light, the proof showed that Brooks deceived Rosenblatt as to the true purpose for which the checks were being cashed. Nevertheless, the government claims that Rosenblatt's agreement to cash the checks, under the assumption that in so doing he might facilitate the avoidance of taxes by the payees thereon, and in spite of Brooks' knowledge that that was impossible, was sufficient to support the charge. It is against this background that that charge, of conspiracy to defraud the United States, "under the broad language of [18 U.S.C. §371,] must be scrutinized carefully..." Dennis v. United States, 384 U.S. 855, 860, 16 L.Ed.2d 973, 978 (1966).

The essence of any conspiracy, is the agreement. Braverman v. United States, 317 U.S. 52, 53, 87 L.Ed. 23, 28 (1942); United States v. Greer, 467 F.2d 1064, 1071 (7th Cir. 1972), cert. denied, 410 U.S. 929, 35 L.Ed.2d 590 (1973); United States v. Downen, 496 F.2d 314, 318 (10th Cir.), cert. denied, 419 U.S. 897, 42 L.Ed.2d 142 (1974). In conspiracy, the agreement itself is the crime, and it is therefore essential to determine what kind of agreement or understanding exists as to each defendant. United States v. Bennett, 409

F.2d 888, 893, rehearing denied, 415 F.2d 1113 (2d Cir.), cert. denied, 396 U.S. 852, 24 L.Ed.2d 101, rehearing denied, 396 U.S. 949, 24 L.Ed.2d 256 (1969), cert. denied, 402 U.S. 984, 29 L.Ed.2d 149 (1971); United States v. Borelli, 336 F.2d 376, 384 (2d Cir. 1964), cert. denied, 279 U.S. 960, 13 L.Ed.2d 555 (1965). The scope of the conspiracy is measured by the agreement entered into by the conspirators. United States v. Bowe, 360 F.2d 1, 8 (2d Cir.), cert. denied, 385 U.S. 961, 17 L.Ed.2d 306 (1966), and 385 U.S. 1042, 17 L.Ed.2d 686, rehearing denied 386 U.S. 969, 18 L.Ed.2d 127 (1967); United States v. Borelli, supra, 336 F.2d, at 385. It is clear that mere knowledge, approval or acquiescence in the object of the conspiracy, without an agreement to cooperate in achieving its object, does not make one a party to the conspiracy. United States v. Downen, supra, 496 F.2d at 319.

What, then, is the nature of the agreement in the case at bar? An examination reveals that if any agreement was proved at all, it is of the narrowest, most limited kind, and is one legally insufficient to form the nucleus of an actionable conspiracy.

(i) Brooks' acts of falsifying the Postal records and obtaining the checks are criminal; of that there is no dispute. Brooks was separately charged with those wrong-

doings in Counts 2 through 9 of the indictment, and, in fact, pleaded guilty to Count 2. Had Rosenblatt known of those acts, and acted as he did, the proof may have sufficiently established a conspiracy. (ii) Likewise, had the facts been as Rosenblatt was allegedly led to believe they were, that he was cashing checks so that the payees could avoid taxes or in some manner conceal kickbacks, again the proof might have sufficiently established a conspiracy.*

The evidence, however, contra-indicates a Brooks-Rosenblatt conspiracy either to falsify Postal records (e.g., "(i)", above), or to avoid taxes or conceal kickbacks (e.g., "(ii)", above. As seen, Brooks deceived Rosenblatt as to the source and nature of the checks he was to cash. The government has conceded that fact, and further that Rosenblatt did not know that Brooks had made false entries or stolen the checks in question. Thus, there was certainly no agreement by Rosenblatt to defraud the United States by falsifying Postal records. Neither was there any agreement by Brooks to defraud the United States by any scheme to evade taxes or

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*See Point I-C, infra, as to why, even if this understanding of the agreement is used as the measure, no conspiracy to defraud the United States was proved.

conceal kickbacks; he knew that that was not being done, and no matter what false representations he may have made, that knowledge foreclosed any meeting of the minds, or agreement, in that regard. And so there was no conspiracy, as to either of those ends.

Nor can the government salvage its conspiracy charge by claiming that despite the states of mind of the actors as set forth above, a conspiracy can exist. When a person with whom another conspires "secretly intends not to go through with the plan, it is generally held that neither party can be convicted [of conspiracy] because there was no 'agreement' between two persons." Wechsler, Jones and Korn, "The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy", 61 Colum. L.Rev. 951, 966 (1961).* Thus, for instance, where a defendant charged with conspiring to bring into the United States Chinese persons not entitled to enter, was lured by government officials into that scheme, and the officials never intended that the scheme be accomplished, it

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*The authors do not agree that this should be the case, and note that it would not be under the Model Penal Code. The provisions of that Code have not, of course, been adopted in the federal jurisdiction.

was held that although the defendant was not aware of the fact, he was engaged in an act which was not to result in an accomplished offense, and the conspiracy conviction was reversed. Woo Wai v. United States, 223 F. 412 (9th Cir. 1915). One who is duped into acting, not agreeing to the object of his actions, is not a conspirator. Thomas v. United States, 398 F.2d 531 (5th Cir. 1967). And, where A was approached by B to take the life of a third person against whom B had a grudge, and A agreed though he never intended to commit the murder, the conspiracy conviction was likewise reversed, upon the holding that there is no agreement or concurrence in fact if one of two alleged co-conspirators only feigns acquiescence in the criminal intent. Delaney v. State, 164 Tenn. 432, 51 S.W.2d 485 (1932). Cf., Odneal v. State, 117 Tex. Cr.R. 97, 34 S.W.2d 595 (1931) (co-conspirators did not intend to bribe witness and there was therefore no agreement, precluding conspiracy conviction); Regle v. State, 9 Md. App. 346, 264 A.2d 119 (1970) (where only remaining co-conspirator is shown to have been insane at the time the agreement was concluded, there is no punishable criminal conspiracy, the requisite joint criminal intent being absent).

Clearly, then, the two defendants in the instant

case did not "agree" to defraud the United States by evading federal taxes or concealing kickbacks. Neither of those objects could have been achieved, and Brooks knew that. He merely feigned acquiescence in them, and thus the requisite joint criminal intent was absent.

It is equally clear, as discussed above, that Rosenblatt could not have conspired with Brooks to defraud the United States by falsifying Postal records and thus obtaining and negotiating fraudulently issued checks, for there was never any "agreement" to do so.

The evidence does not support a finding of any other common object of the conspiracy. Though there was never any agreement as to object, however, viewing the evidence most favorably to the government, Brooks and Rosenblatt did each intend, at least, to defraud the United States, albeit each with a different manner in mind. Examination of the conspiracy statute indicates that that is an insufficient common denominator to support the conviction.

Section 371 of 18 U.S.C. provides, in pertinent part:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both..."

The words "in any manner or for any purpose" quite clearly refer to the verb "conspire," or more accurately -- in the case at bar -- to the phrase "conspire... to defraud the United States." If a naked conspiracy to defraud is to be sufficient, the qualifying words "in any manner or for any purpose" would be superfluous. Section 371 cannot be read that way, for "it is a general rule of statutory construction that words in statutes should not be construed as excess verbiage." United States v. Bamberger, 452 F.2d 696, 699 (2d Cir. 1971), cert. denied, 405 U.S. 1043, 31 L.Ed.2d 585 (1972), citing II Sutherland Statutory Construction ¶4705 (3d Ed. 1943). In that same case, this Circuit went on to state, in construing 18 U.S.C. §111, which prohibits forcible assault, resistance or interference with certain enumerated federal officials, that the qualifying word "ought to limit the proscribed acts to fewer than would fit the definition of the unmodified verbs above." United States v. Bamberger, supra.

Implicit in any allowance that the conspiracy to defraud be done "in any manner or...purpose" is the necessity that it be done in some manner or purpose. Thus, an agreement simply "to defraud" is not enough. This conclusion is not merely dictated by a priori statutory interpretation, as compelling as that interpretation is. It is also dictated by case law and logic.

Not a single reported decision has been found, among federal or state courts, nor has reference to any such decision by any commentator been located, in which a "conspiracy to defraud" case has been discussed, wherein the agreement alleged is simply a broad area of defrauding the United States. Each and every opinion refers to a conspiracy to defraud "by...", and goes on to name the agreed upon manner or purpose, such as bribing voters, obtaining payment of false claims, making false documents, using counterfeit government stamping devices, etc. Professor Abraham Goldstein, in "Conspiracy to Defraud the United States," 68 Yale L.J. 405, 436-438(1959)*, has categorized the types of agreements which

*Professor Goldstein's article contains a most thorough and exhaustive analysis of conspiracy to defraud, from its early origins and legislative background to suggested solutions to some of the problems it raises.

underlie conspiracies to defraud:

> "Thus far, detailed consideration has been given to the conceptual evolution of the phrase 'defraud the United States.' It is somewhat unclear - because so much of the trial process is lost to all but the participants - whether the cases have in fact rested upon as broad an application of that phrase as judicial interpretations would seem to allow. Nevertheless, the reported decisions lend themselves to some meaningful generalizations. The cases fall into six categories.
>
> "1. Agreements to interfere with the administration of official duties, initiated by corrupt officials themselves, or by others corrupting government officials so that they will act for their personal gain and against the interests of the United States. Though false statements may incidentally be involved, the main thrust is bribery or a similar device used to corrupt.
>
> "2. Agreements to use practices recognized as frauds at common law, such as false statements or impersonations, by persons dealing with the Government in arm's-length business relationships, in order to obtain money, property contracts or benefits provided by law.
>
> "3. Agreements to steal or 'convert' money or property of the Government or its instrumentality.
>
> "4. Agreements to defeat the administration of justice in the federal courts or in administrative agencies, either through bribery, perjured testimoney or the obtaining of bail by false statements.
>
> "5. Agreements to deprive the Government of taxes or customs duties - by means of false tax returns or by smuggling or secreting goods or by mislabeling them so that taxable items appear to be nontaxable.

> "6. Agreements to defraud by interfering with a lawful function of government, usually in ways similar to those set out above, but where the charge is case principally in terms of 'interference' or 'obstruction'. (footnotes omitted)

Nowhere in the "hundred-odd opinions" those categories represent is there any consideration of a naked conspiracy to defraud without a supporting agreement as to manner and purpose.

As an analysis of the categories indicates, and as the article notes (Goldstein, supra, at 438-439), the pattern of conduct which emerges in almost every case is an agreement to violate some statute creating a substantive crime or a non-criminal offense.* Thus, most of the crimes charged could be prosecuted under the first half of 18 U.S.C. §371, which reaches conspiracy to commit any "offense" against the United States. This fact does not prevent the government from proceeding under the second, or conspiracy to defraud half, Dennis v. United States, supra, 384 U.S. at 862-864, 16 L.Ed.2d at 979-980, but it does provide the basis for an interesting analogy.

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*A generous reading of the indictment seems to reveal that that is what was intended to be alleged in the instant case, but what might have been omitted because of the recognition of the lack of agreement as to any such crime or offense.

In order to sustain a conviction on a charge under the first, or "offense" half of section 371, "the Government must prove at least the degree of criminal intent necessary for the substantive offense itself," United States v. Feola, 420 U.S. 671, 686, 43 L.Ed.2d 541, 554 (1975), or, in other words, "that the defendant had the specific intent to violate the substantive statute." United States v. Cangiano, 491 F.2d 906, 909 (2d Cir.), cert. denied, 419 U.S. 904, 42 L.Ed.2d 149 (1974). There must be "proof of an agreement to commit [the] offense." Ingram v. United States, 360 U.S. 672, 678, 3 L.Ed.2d 1503, 1508 (1959).

In a situation where a conspiracy is prosecutable under either half of section 371, the government has the option, as we have seen above, of choosing under which to proceed. If they opt for the "offense" half, they must prove specific intent to violate the statute involved, and an agreement to commit the offense. Could they circumvent those requirements merely by relabeling and opting to proceed under the defraud half? Logic and experience say no - the most basic concepts of justice and fairness would prohibit it. Yet, if all that is necessary to sustain a conspiracy to defraud is a naked agreement to defraud, the answer has to be yes. For under the same set of supposed facts, the burdens and

elements of proof would be different, and the result might be an acquittal under the "offense" charge, and a conviction under the "defraud" charge.*

An alleged conspiracy to defraud the United States must be grounded in some agreed upon common scheme or design. Since the evidence adduced indicates that no such agreement was reached, no conspiracy to defraud the United States was proved. Rosenblatt's conviction on that charge must be reversed, and the indictment (in which that is the sole charge against Rosenblatt) should be dismissed.

B. Even if a conspiracy was proved, the evidence was insufficient in that no act of either of the conspirators to effect the object of the conspiracy was proved to have been committed in the Southern District of New York, and venue in that district was therefore lacking.

Even had a criminal conspiracy been proved (and for the reasons stated in Points I-A, supra, and I-C, infra, it is urged that it was not), it is not one cognizable in the

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*Further considerations indicating that the scope of a conspiracy to defraud must be limited by some common plan or design are set forth in the related discussion of venue, infra, Point II-B.

Southern District of New York, where the prosecution took place.

A stated in 18 U.S.C. §371, an element of the conspiracy charged is that "one or more of [the conspirators] do any act to effect the object of the conspiracy." A conspiracy may only be prosecuted in the district where it was formed or that where any of the overt acts were committed. Hyde v. United States, 225 U.S. 347, 56 L.Ed. 1114 (1912). But no overt acts in furtherance of the purported Brooks-Rosenblatt conspiracy took place in that district. As such, venue was not proved, and the evidence is therefore insufficient to support a conviction. United States v. Gross, 276 F.2d 816, 818-819 (2d Cir.), cert. denied, 363 U.S. 831, 4 L.Ed.2d 1525 (1960).

There was no proof, nor, indeed, any claim by the government, that any alleged agreement was formed in the Southern District of New York. The only acts proved to have taken place there were those of Brooks in falsifying the Postal records and obtaining the checks, which the government stipulated was done without the knowledge, awareness or participation of Rosenblatt.* If any of those overt acts was

*Indeed, were it not for those acts, the record would be practically barren of any reference to the Southern District at all.

done in pursuance of, or to effect the objects of the conspiracy, jurisdiction of the trial court over the conspiracy would have existed. If none of those acts was done in pursuance of, or to effect the objects of the conspiracy, jurisdiction was lacking.

If a conspiracy to defraud the United States by falsifying Postal Service entries, and thus obtaining checks fraudulently, had been alleged and proved, the overt acts proved in this district would have been sufficient to confer jurisdiction. But, as has been discussed in Point I-A, supra, this is not such a conspiracy.

If, however, this was a conspiracy to evade taxes or conceal kickbacks - or even some naked conspiracy to defraud -- the overt acts proved in the Southern District are insufficient to confer jurisdiction as they are not in furtherance of such a conspiracy.

It is not disputed that once a conspiracy has been shown, each conspirator is responsible for the acts of his co-conspirators committed pursuant to and in furtherance of the conspiracy, even if he is unaware of them (United States v. Brasco, 516 F.2d 816, 818 (2d Cir.), cert. denied, 423 U.S.

994, 46 L.Ed.2d 88 (1975)), or of the existence of the co-conspirator performing them (United States v. Cirillo, 468 F.2d 1233, (2d Cir. 1972), cert. denied, 410 U.S. 989, 36 L.Ed.2d 188 (1973)), or even in some instances, if they were committed without his knowledge before he joined the conspiracy (United States v. Marionneaux, 514 F.2d 1244, 1250 (5th Cir. 1975)). But in each instance the act must have been done in furtherance of the conspiracy, a condition which was not met in this case.

An act done in furtherance of a conspiracy must be within the scope of such conspiracy, which in turn is measured by the agreement purportedly entered into by the conspirators. United States v. Bowe, 360 F.2d 1, 8 (2d Cir.), cert. denied, 385 U.S. 961, 17 L.Ed.2d 306 (1966), rehearing denied, 386 U.S. 969, 18 L.Ed.2d 127 (1967). The limits to which this vicarious responsibility extend were set forth in United States v. Peoni, 100 F.2d 401, 403 (2d Cir. 1938), more recently quoted with approval in United States v. Borelli, 336 F.2d 376, 385 (2d Cir. 1964), cert. denied, 279 U.S. 960, 13 L.Ed.2d 555 (1965):

> "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it." (emphasis added)

In accord is United States v. Andolschek, 142 F.2d 503, 507 (2d Cir. 1944) recently quoted with approval in United States v. Greer, 467 F.2d 1064, 1070 (7th Cir. 1972), cert. denied, 410 U.S. 929, 35 L.Ed.2d 590 (1973):

> "It is true that a party to a conspiracy need not know the identity, or even the number, of his confederates; when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. Nevertheless, he must be aware of those purposes, must accept them and their implication, if he is to be charged with what others may do in execution of them." (emphasis added)

Juxtaposing the proof to the rules that are thus applicable, the overt acts attributed to Brooks in the Southern District could in no way be in furtherance of any conspiracy Rosenblatt may have entered into. Even if the concerted purpose or agreement which the government claims Rosenblatt was party to is as encompassing as a naked defrauding of the United States, unlimited by common design, its fair import would not extend to acts that were not only done

without his knowledge, but were unreasonable, completely unnecessary, and wholly unforeseeable to the agreement as he understood it. This was not a criminal venture of indefinite outline wherein Rosenblatt was brought checks to be cashed, was left to speculate as to the manner by which Brooks obtained them, but accepted them and the implications of whatever Brooks did in fact do, as being necessary to the scheme. Rather, as Rosenblatt understood it, the venture he embarked on was of a very definite outline, and thus Brooks' falsification acts in the Southern District transcended what was implied by those common purposes he understood and accepted.

Although conspiracies are generally thought of in terms of the persons involved, mere association with conspirators does not constitute proof of participation in the conspiracy, United States v. Falcone, 311 U.S. 205, 85 L.Ed. 128 (1940); the agreement and acts done pursuant to it must be examined. The acts supposedly done in furtherance of the conspiracy herein that would confer jurisdiction (falsifying records) were done by only one of the conspirators (Brooks)*.

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* As noted, not only were they admittedly done without Rosenblatt's knowledge, even their existence being withheld from him, but they represented a direct contradiction of the assurances given by Brooks as to how the checks were obtained.

For ease of presentation let us assume that Brooks was assisted by a third person, X, in falsifying the records, and that the third person possessed the same culpable mental state as did Brooks. The character of those acts would not change, and if they were originally in furtherance of a conspiracy of which Rosenblatt was a part, they would still be so, and X would be a co-conspirator. If they were not in the first instance in furtherance of a conspiracy between Brooks and Rosenblatt, then they would merely be independent unlawful acts on Brooks' part, and the addition of X's participation would turn them into the basis of a second conspiracy -- this one between Brooks and X.

This hypothetical assistance given Brooks (X's role) allows independent testing as to whether the acts of falsification in the Southern District were in furtherance of any conspiracy allegedly proven.

While it is true that a conspiracy in the form of a wheel -- with spokes radiating from a common hub -- can be viable, multiple conspiracies will be found where the spokes are separate and independent groups, none having any connection with the other, though they all transact with the same hub. Kotteakcs v. United States, 328 U.S. 752, 754-755, 90

L.Ed.2d 1557, 1561 (1946). Certainly the facts alleged in the instant case exhibit that kind of a relationship, and, as in Kotteakos, there is no "rim of the wheel to enclose the spokes." Id., at 755, 90 L.Ed. at 1561. Thus, a finding of multiple conspiracies is necessary because the act in which each spoke (Rosenblatt and X) is involved with the hub (Brooks) bears no relation to the act in which the other spoke is involved.* As shown above, removing X from the picture into which he had been artificially inserted does not change the character of the acts in which he was hypothetically involved; the fact that they now become solely Brooks' acts does not imbue them with any greater relationship to the Brooks-Rosenblatt agreement than they had before.

Another test by which to measure whether acts are in furtherance of a conspiracy stems from the well-established rule that a conspirator can be held liable not only for the conspiracy, but also for all substantive offenses committed by his co-conspirators in furtherance of the conspiratorial objectives. Pinkerton v. United States, 328 U.S. 640, 90 L.Ed. 1489 (1946); United States v. Iannelli, 461 F.2d 483,

*Indeed, what might be a single conspiracy for a hub might not be for the individual spokes. United States v. Chin, 534 F.2d 1032, 1035 (2d Cir. 1976)

487 (2d Cir.), cert. denied, 409 U.S. 980, 34 L.Ed.2d 243 (1972). Brooks' acts in falsifying the Postal Service records for which Brooks alone was charged (Counts 2-9 of the indictment) in which the government admits Rosenblatt did not participate nor have knowledge, and of which, in fact, Brooks deceived Rosenblatt, constituted substantive offenses (18 U.S.C. §2073). Applying the Pinkerton rule, if these acts -- the only overt acts proved in the Southern District -- were committed in furtherance of the conspiracy, Rosenblatt would be liable for them, and would have been chargeable with them as substantive crimes as was Brooks.* According to the government's reasoning -- that once an agreement to defraud exists there need be no further agreement as to the manner of defrauding -- a conspirator would be liable for any act his co-conspirator commits in achieving that open-ended goal, since any such act would be in furtherance of the basic agreement. Thus, if Brooks had committed armed robbery to obtain the checks even though he told Rosenblatt he received them from friends who wanted to avoid taxes, the armed robbery would have been in furtherance of the conspiracy, and

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*Even the Government realized the absurdity of such a contention, as they did not indict Rosenblatt for those crimes.

attributable to Rosenblatt. If Brooks had murdered to get the checks, Rosenblatt would be a murderer. The seriousness, or lack thereof, of Brooks' acts does not change their nature; armed robbery and murder to obtain the checks would have been as much within the scope, and in furtherance of, any agreement Rosenblatt was part of, as was falsifying the records to obtain the checks.*

These results clearly indicate that the Postal acts -- the Southern District acts -- were not, in fact, in furtherance of any conspiracy between Brooks and Rosenblatt. As the Supreme Court said in Pinkerton v. United States, supra, 328 U.S. at 647-648, 90 L.Ed. at 1497, after concluding in that case that the substantive Internal Revenue violations committed solely by one of two conspirators were committed in furtherance of the conspiracy, and thus could be the basis for a conviction of the other conspirator:

> "A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project,

*This, as well as the other venue arguments indicating that Brooks' acts were not in furtherance of the conspiracy, lend further support to the contention in Point I-A, supra, that there must be some agreed upon manner or common objective of a conspiracy to defraud.

"or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement."

Brooks' acts were anything but reasonably foreseeable as necessary or natural consequences of the agreement, whether it was unlawful or not. As such, they were not committed in furtherance of the conspiracy charged. Being the only purported overt acts proved in the Southern District, the court below lacked jurisdiction over the conspiracy, and the conviction of Rosenblatt of that crime must be reversed, and the indictment dismissed.

C. Even if the conspiracy is measured by the agreement Rosenblatt believed he had entered into, the evidence was insufficient to support a conspiracy to defraud the United States.

Even if the facts were exactly as Brooks led Rosenblatt to believe, the proof was insufficient to support the conviction. That is true whether the government's position (A259) -- that it is enough for a conspiracy to defraud the United States if Brooks and Rosenblatt individually agreed to defraud the United States, without any agreement as to a common design to achieve that goal -- or the alternative position -- that there must be an agreement as to design

beyond the naked agreement to defraud, but that the ancillary agreement can be found even if one of the parties thereto is aware that it is impossible to effect -- is accepted. In each case this is so because a finding that Rosenblatt agreed to defraud the United States is necessary, but is unsupported by the evidence.

Under each theory, whether Brooks and Rosenblatt conspired to defraud the United States is measured by the agreement into which Rosenblatt understood he had entered. The interpretation of that agreement most favorable to the government is that gleaned from Brooks' testimony.

Brooks never told Rosenblatt that the payees on the checks wanted to evade taxes, willfully or otherwise.* Though he testified that on two occasions he said the payees did not

*Even if Brooks had told Rosenblatt that the payees wanted to "evade" taxes, a conclusion that illegality was involved is not inevitable. The words "tax evasion" have been viewed to be susceptible to alternative constructions: first, as representing a crime denoting concealment and an attempt to escape by wrongdoing the payment of taxes due the government, citing 26 U.S.C.A. §7201; and second, representing tax avoidance, or taking advantage of lawful tax avoiding devices with the objective of minimizing the tax burden. Jones v. Garner, 250 S.C. 479, 158 S.E.2d 909, 32 ALR3d 1417, 1424 (1968).

want the checks to go through their own accounts because they did not want to pay taxes (A44, A50), he subsequently volunteered, when asked to repeat what he told Rosenblatt about the checks, that he had said the persons did not want to put them through their accounts "because they wanted to save on the taxes" (A120-A121; c.f., A122, A123). He never told Rosenblatt how this was to be done, or that he, Brooks, knew or considered it to be illegal. Neither did he mention that the taxes about which he was speaking were federal taxes, or that any of the monies that might have been saved, or otherwise not paid, were actually due the United States.

Not depositing monies in certain accounts because of a desire to save on taxes, or even to avoid paying them, does not amount to a defrauding. At worst, it might be indicative of a desire not to disclose income, but "[m]ere failure to disclose income would not be sufficient to show the crime charged of defrauding the United States under 18 U.S.C. §371." United States v. Klein, 247 F.2d 908, 916 (2d Cir. 1957), cert. denied, 355 U.S. 924, 2 L.Ed.2d 354 (1958).

The fact that there was no proof, nor even any attempt to prove, that any tax was indeed owing to the United

States is yet another bar to a finding that the evidence was legally sufficient to show the defrauding necessary.

In United States v. Petti, 448 F.2d 1257 (3d Cir. 1971), a similar failure to show a tax deficiency proved fatal to the government, in a situation quite analogous to that found in the instant case. There the defendant was a "ten percenter," that is, a person who cashes race track tickets for the true winner in exchange for a 10% commission.* He was caught plying his trade, but at his trial for willfully attempting to evade or defeat the payment of income tax by the true winner, in violation of 26 U.S.C. §7201, the government did not prove a deficiency for the winner in the year

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*The court more fully described a "ten-percenter" as follows:

> "In order to cash a Big Exacta ticket worth $600 or more the ten-percenter must provide some identification and sign Form 1099. This form is required by the Internal Revenue Service in order to see whether such winnings are reported for tax purposes. Since the ten-percenter rather than the true winner signs, the Service has no record of the true winner who, of course, does not report his winnings for tax purposes. The ten percenter reports his winnings but is able to offset his 'losses' against his 'winnings.' Thus, in the normal course of events, the ten-percenter practice deprives the government of income tax." United States v. Petti, supra, 448 F.2d at 1259-60.

involved. The court reversed the conviction, rejecting the government's contention that once the defendant's attempt to commit the crime is proved the crime is complete, and sustaining the defendant's position that even if the attempt is proved, proof of a tax deficiency is a prerequisite to a conviction.

The application of that case to the facts herein is not lessened because the charge against Rosenblatt was conspiracy rather than the substantive offensive of attempting to evade taxes. Conspiracies to violate that offense are uniformly charged in terms of attempts to evade and defeat taxes "due and owing to the United States." United States v. Gordon, 242 F. 2d 122, 126 (3rd Cir.), cert. denied, 354 U.S. 921, 1 L.Ed.2d 1436 (1957); United States v. Keenan, 267 F.2d 118,124 (7th Cir.), cert. denied, 361 U.S. 863, 4 L.Ed.2d 104, rehearing denied, 361 U.S. 921, 4 L.Ed.2d 189 (1959). Even though the conception that a criminal conspiracy has been formed may be less restrictive than whether an attempt has gone far enough to make an act criminal, United States v. Del Toro, 513 F.2d 656, 664 (2d Cir.), cert. denied, 423 U.S. 948, 46 L.Ed.2d 42 (1975), as no actual tax evasion is necessary to convict under 26 U.S.C. §7201, neither is realization of the object of a conspiracy necessary to convict under 18 U.S.C. §371. United States v. Kellerman, 431 F.2d 319, 32

(2d Cir.), cert. denied, 400 U.S. 957, 27 L.Ed.2d 266 (1970). It follows that if proof of a tax deficiency is necessary to show an attempt, it is also necessary to the parallel conspiracy.

Neither is the rationale of United States v. Petti, supra, inapplicable because the charge herein is conspiracy to defraud rather than to violate the substantive statute. As noted and discussed in Point I-A, supra, at pp. 22-24, it would be unjust to allow the government to circumvent the more restrictive requirements involved in proving an offense-conspiracy by merely relabeling the charge and opting to proceed by way of a defraud-conspiracy. And the government cannot now assert that the proof relating to tax avoidance supported a finding of conspiracy to defraud the United States in the performance of its lawful governmental functions rather than to defraud it out of money due from taxes, since there was no evidence presented on that point, and that was not the theory upon which the case was tried. United States v. San Juan, (2d Cir. November 10, 1976), slip. op. at p. 471.

Just as Brooks' tale of tax avoidance is insufficient to show a conspiracy to defraud, so is his story, told on two occasions, about kickbacks. What Brooks said was that

the payee "had a contract with the Government and he's getting a kickback or something," and therefore did not want to put the checks through his account (A46-A47). As ambiguous as that statement is, it pales even further when the fact that the checks involved were all issued by the government is considered, and the problem of how the United States is going to be defrauded with respect to potential income that it itself paid to certain persons is faced.

Even, therefore, if everything Brooks told Rosenblatt was true, the proof was insufficient to show that the agreement entered into by Rosenblatt was one to defraud the United States. The conviction must therefore be reversed, and the indictment dismissed.

POINT II

The Court's Charge Contained Reversible Error.

Though requested to do so, the court declined to charge the jury that there could be no conspiratorial agreement if Brooks and Rosenblatt did not agree to cooperate in achieving the same object, or if "one of the conspirators had one object in mind, such as defrauding the Government by stealing postal checks, while the other had a different object, such as defrauding the Government by, for instance, helping to evade taxes." (A558, A426). A request to charge that there can be no conspiratorial agreement if one of two alleged conspirators secretly intends not to go through with the plan, and that a person who is duped into acting, not agreeing to the object of those actions, is not a conspirator, was likewise rejected (A560). Exception to the omission of these principles was made (A527). For the reasons stated in Point I-A, supra, those requested instructions substantially reflect the applicable law in this area, and, in that they relate to an element of the crime, their omission from the charge was reversible error.

The court also rejected that portion of

Rosenblatt's requested instruction on venue, adapted from Pinkerton v. United States, supra, which stated that if the purported overt act "does not fall within the scope of the unlawful project, or is merely a ramification of the plan which could not be reasonably foreseen by the other conspirators as a necessary or natural consequence of the agreement, then it is not an act in furtherance of the conspiracy." (A556-A557, A426). Exception to the omission was, again, noted (A527). For the reasons stated in Point I-B, supra, that requested instruction substantially reflects the applicable principle of law in this area, and, in that it, too, relates to an element of the crime, its omission from the charge was reversible error.

CONCLUSION

For the aforementioned reasons, the judgment of conviction appealed from must be reversed and the indictment dismissed.

Respectfully submitted,

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Service of 3 copies of the
within Brief is hereby
admitted this 24th day of
Nov. 19 76

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